83-1310

No._____

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In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., WILLOWS WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

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February, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court can destroy the rights of the federal government and its patentees to the nontributary ground water underlying the owners' lands?

2. Whether the Colorado Supreme Court can defeat the constitutional prohibition against taking property without due process by asserting that the water rights never existed in the face of its unequivocal affirmation of the rights twenty years earlier?

3. Whether the Colorado Supreme Court has impaired the obligations of contracts by declaring, after twenty years of reliance upon its property doctrines, that purchasers of land did not, as its rulings had earlier stated, acquire a right to the nontributary ground water beneath the land?

PARTIES

The parties to the proceeding before the Supreme Court of the State of Colorado include:

STATE OF COLORADO, DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER RESOURCES, STATE ENGINEER; JOHN HUSTON, ALAN LEAFFER, and WALLACE YAFFE, d/b/a BLUEPOND ASSOCIATES, STONYBROOKE ASSOCIATES, TASKMASTER TRUST, WET ROCK TRUST, TROUT CREEK ASSOCIATES, DEXTER ENTERPRISES, AMITY ASSOCIATES, TABERNASH ASSOCIATES, NEW COLORADO ASSOCIATES, NEW ARIES ASSOCIATES, CONSUMER VENTURES, MARKLINE VENTURES, TRIDENT MESA VENTURES, PARADOX ASSOCIATES, ELK CREEK VENTURES, KADOTA ENTERPRISES, EAST PARK ASSOCIATES, STARGLAZE ENTERPRISES, PURIROSE ASSOCIATES and HARLAN-BISMUTH ASSOCIATES; CF&I STEEL CORPORATION; TRUJILLO CREEK CATTLE COMPANY; and OPEN CIRCLE N RANCH; COLORADO PACIFIC AZTEC; COLORADO PACIFIC ENERGY; NEDLOG TECHNOLOGY GROUP; AMAX, INC.; CITY OF ARVADA; BANKER'S TRUST; CITY OF BOULDER; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DENVER SOUTHEAST SUBURBAN WATER AND SANITATION DISTRICT, DOUGLAS PARK, LTD.; CITY OF FEDERAL HEIGHTS; GENESSEE WATER AND SANITATION DISTRICT; HIGHLAND DITCH COMPANY; INVERNESS WATER AND SANITATION DISTRICT; ROBERT D. LINDNER; MARATHON OIL COMPANY; MISSION VIEJO COMPANY; SOUTH ADAMS COUNTY WATER AND SANITATION DISTRICT; GOLF HOST

WEST, INC.; THUNDERBIRD WATER AND SANITATION DISTRICT; TRAILWOOD NORTH; CITY OF TRINIDAD; UNION OIL COMPANY; ADAMS RIB RANCH CORPORATION; ATLANTIC RICHFIELD COMPANY; BLACKLAND PROPERTIES, INC.; CHEVRON SHALE OIL COMPANY; CHEVRON U.S.A., INC.; J. RATHBONE FALCK; GOLDSMITH METROPOLITAN DISTRICT; ROBERT KNAPP; KOPPERS COMPANY, INC.; NU-WEST DEVELOPMENT CORP.; ROY H. OTT, JR.; RIO GRANDE WATER USERS ASSOCIATION; STERNS-ROGER CORPORATION; VALLEY COUNTRY CLUB; CITY OF WESTMINISTER; BOB JOHNSTON, JR.; AZL RESOURCES, INC.; THE BESSEMER IRRIGATION DITCH COMPANY; CHEROKEE WATER DISTRICT; CIMARRON CORPORATION; CITY OF FOUNTAIN; COPPA CATTLE COMPANY; SWEETWATER DEVELOPMENT COMPANY; ADOLPH COORS COMPANY; CAROLYN ALLABASHI; AMERICAN MEDICAL CENTER; ARAPAHOE COUNTY AIRPORT; BEAR CREEK DEVELOPMENT COMPANY; BRANNAN SAND AND GRAVEL; DANIEL F. BURNS; CHERRY HILLS COUNTRY CLUB; DENVER TURF FARMS; LESTER A. DIXON; BRUCE DIXON; JOANN DIXON HANSEN; EAST CHERRY VALLEY WATER AND SANITATION DISTRICT; ALFREDA GUY; HEWLETT-PACKARD; JOHN MADDEN COMPANY; CITY OF LOVELAND; LOVELAND READY MIX CONCRETE COMPANY; LEONARD LOUKONEN; REINO LOUKONEN; TOWN OF LYONS; W. EVERT MELLEMA; ORR CONSTRUCTION COMPANY; PENTA, INC.; PERRY PINE AREA HOMEOWNERS; PORTER MEMORIAL HOSPITAL; PRESBYTERIAN MEDICAL CENTER; RICHLAWN TURF FARMS, INC.; SMOKEY HILLS LAND COM-

PANY; SOUTH CHERRY CREEK LAND COMPANY; WALTER STONEHOCKER; SWEDISH MEDICAL CENTER; JOSEPH B. THOMAS; WILLOWS WATER DISTRICT; WOODSIDE LTD.; YMCA OF THE ROCKIES; EDWARD T. YOUNG, JR.; SOUTHWEST PROPERTIES; COPPER MOUNTAIN and COPPER MOUNTAIN WATER AND SANITATION DISTRICT; NINE MILE RANCH; PETER JAFFE; BIG ELK MEADOWS ASSOCIATION; CITY AND COUNTY OF DENVER BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS; CITY OF WHEAT RIDGE and TOWN OF BRECKENRIDGE; UNITED STATES OF AMERICA; PARADISE OIL, WATER and LAND DEVELOPMENT, INC.;

Appellants and Cross-Appellees,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT; SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT; COLORADO RIVER WATER CONSERVATION DISTRICT; GLEN SCHMIDT; BETTY JO SCHMIDT; JACK E. SCHMIDT; BENTON LAND AND LIVESTOCK COMPANY; MERRIL HASTINGS and BEN WURTSMITH; STONE CREEK COMPANY; GROUSE MOUNTAIN AT VAIL, LTD.; EAGLE-VAIL METROPOLITAN DISTRICT; BENCHMARK AT BEAVER CREEK; AVON METROPOLITAN DISTRICT; FRED GREEN; JUNE CREEK RANCH COMPANY; CRESTED BUTTE WATER AND SANITATION DISTRICT; LEONARD HORN; HIGH PLAINS WATER USERS ASSOCIATION;

Appellees and Cross-Appellants,

and

NORTHERN COLORADO WATER CONSERVANCY

DISTRICT; MUNICIPAL SUBDISTRICT NORTHERN COLORADO WATER CONSERVANCY DISTRICT; E. I. DuPONT deNEMOURS & CO.; ENSIGN BICKFORD COMPANY; COLORADO WATER PROTECTIVE AND DEVELOPMENT ASSOCIATION; PURGATOIRE RIVER WATER CONSERVANCY DISTRICT; JOHN T. OXLEY; ELYSIAN CORPORATION; KEYSTONE, a division of RALSTON-PURINA COMPANY, a Missouri corporation; THE NEW JERSEY ZINC COMPANY, a division of G.W. NATURAL RESOURCES GROUP; LAZY EH RANCH; L.P.E. ESTATES, INC. as successor in interest to EAST PARK, INC.; LINCOLN PROPERTY COMPANY; UPPER YAMPA WATER CONSERVANCY DISTRICT; COUNTY OF ROUTT, COLORADO; PERRY PARK WATER AND SANITATION DISTRICT; CACHE LaPOUDRE WATER USERS ASSOCIATION; JACKSON COUNTY WATER CONSERVANCY DISTRICT; THE CITY OF FORT COLLINS, COLORADO; THOMPSON WATER USERS ASSOCIATION; THE CITY OF BRIGHTON, COLORADO; CITY OF GOLDEN; FRED G. KNIGHT; CURTIS H. CASTLEMAN; A. KALTENBACK; PERRY PARK PROPERTIES, INC.; ROYAL CREST JERSEY FARMS, INC.; WHEATON COLLEGE; LINCOLN PARK WEST METROPOLITAN DISTRICT; ANNUITY BOARD OF THE SOUTHERN BAPTIST CONVENTION; WJ LAND & CATTLE CO.; PUBLIC SERVICE COMPANY OF COLORADO; VIDLER TUNNEL WATER CO.; TERRACOR; SOUTH SUBURBAN METROPOLITAN RECREATION AND PARK DISTRICT; TOWN OF CASTLE ROCK; F. B. ROOKE & SONS; CHESS-SHOEMAKER RANCHES, INC.; J. FRANK; HAZEL J. DILLEY; ARTHUR W. DILLEY and LAURIN DILLEY d/b/a A. W. DILLEY & CO.; JOHN E. and MABLE M. WILSON; JIM and ANN LIKE; C.

ROY and BENETA CANTERBURY; J. GOLDEN BAIR; CITY OF NORTHGLENN, COLORADO; GEORGE R. WEBSTER; ELIZABETH M. WEBSTER; CITY OF ASPEN, COLORADO; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITKIN, COLORADO; THE HOLBROOK MUTUAL IRRIGATING COMPANY; THE LAS ANIMAS CONSOLIDATED CANAL COMPANY; TOWN OF LaVETA, COLORADO; COUNTY OF KIOWA, COLORADO; AVONDALE WATER & SANITATION DISTRICT; ST. CHARLES MESA WATER ASSOCIATION; COLORADO CITY WATER & SANITATION DISTRICT a/k/a COLORADO CITY METROPOLITAN DISTRICT; SALT CREEK WATER & SANITATION DISTRICT; PUEBLO WEST METROPOLITAN DISTRICT; GREENHORN MOUNTAIN WATER ASSOCIATION, INC.; ARKANSAS VALLEY DITCH ASSOCIATION; LOWER ARKANSAS VALLEY COUNCIL OF GOVERNMENTS; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OTERO, COLORADO; CITY OF ROCKY FORD, COLORADO; TOWN OF CHERAW, COLORADO; WEST GRAND VALLEY WATER COMPANY; SOUTH SWINK WATER COMPANY; VALLEY WATER COMPANY; BENT'S FORT WATER COMPANY; EUREKA WATER COMPANY; HILLTOP WATER COMPANY; PATTERSON VALLEY WATER COMPANY; EAST END WATER COMPANY; WEST HOLBROOK WATER COMPANY; FAYETTE WATER ASSOCIATION; SOUTH SIDE WATER COMPANY; BEEHIVE WATER COMPANY; SCHLEGEL WATER COMPANY; RIVERSIDE WATER COMPANY; HANCOCK WATER COMPANY; NEWDALE-GRAND VALLEY WATER COMPANY; VROMAN WATER COMPANY; TUCKER FARMS; TOWN OF SWINK, COLORADO; TOWN OF MANZA-

NOLA, COLORADO; HOLBROOK CENTER WATER COMPANY; TIMBERLAKE GRAZING ASSOCIATION; 96 PIPELINE COMPANY; WILHELM FEEDLOTS, INC.; H.G. ISBILL; ELEANOR L. ISBILL; CITY OF GRAND JUNCTION; MARIE SCOTT; LORRAINE HARNEY; CHARLES SCUDDER; ELIZABETH A. SCUDDER; HOLLY SCUDDER DIFANI; JEAN SCUDDER; CAROLYN MILLER; RICHARD B. SCUDDER; BIJOU IRRIGATION COMPANY; BIJOU IRRIGATION DISTRICT; RIVERSIDE IRRIGATION COMPANY; RIVERSIDE IRRIGATION DISTRICT; JACKSON LAKE COMPANY; FT. MORGAN RESERVOIR AND IRRIGATION COMPANY; WELDON VALLEY DITCH COMPANY; DUEUL AND SNYDER DITCH COMPANY; SNYDER-SMITH DITCH COMPANY; JOHNSON-EDWARDS COMPANY; TREMONT DITCH COMPANY; LOWER PLATT AND BEAVER DITCH COMPANY; UNION MUTUAL DITCH COMPANY; TETSEL DITCH COMPANY; BRUSH CREEK AND EAGLE RIVER COMPANY; COUNTY OF PARK, COLORADO; THE FARMERS RESERVOIR & IRRIGATION COMPANY; AMITY MUTUAL IRRIGATION COMPANY; DISTRICT 67 IRRIGATION CANALS ASSOCIATION; TOWN OF FAIRPLAY, COLORADO; WATER IN OUR WELLS (W.O.W.); WAYLAND PHILLIPS; CHERRY CREEK DISTRICT #5; CITY OF GREELEY; WATER & SEWER BOARD OF THE CITY OF GREELEY; WESTERN WATER RESOURCES; PHILLIPS 1527; TECHTRACK; NEW LEAF NURSERY; CATHERINE H. ANDERSON; ARAPAHOE WATER & SANITATION DISTRICT; BANCROFT WATER & SANITATION DISTRICT; BELLVIEW GREEN LTD.; BOX ELDER WATER & SANITATION DISTRICT; CASTLE PINES METRO-

POLITAN DISTRICT; GREENWOOD PLAZA WATER DISTRICT; SILVER HEIGHTS WATER & SANITATION DISTRICT; PINE MEADOW TREE FARM; COUNTRY HOMES LAND COMPANY; COLUMBINE LAKE WATER & SANITATION DISTRICT; VAIL INTERMOUNTAIN WATER DISTRICT; DURANGO SKI CORPORATION; PURGATORY WATER & SANITATION DISTRICT; FT. LYON CANAL COMPANY; SPADY BROTHERS; RIVER CANYON RANCH COMPANY; TITAN ROAD I LAND INVESTMENT COMPANY; HAROLD F. HURST; SHEILA K. PRIMM HURST; DONALD ROSSI; OLGA SAFRANEK; ROBERT J. SAFRANEK; ALAN SAFRANEK; ROSANN SAFRANEK; BUFFALO PARK DEVELOPMENT COMPANY; CASTLE OAKS CORPORATION; F. BURR BETTS; CHARLES B. HENDERSON; STEAMBOAT LAKE WATER DISTRICT; UPPER ARKANSAS WATER CONSERVANCY DISTRICT; GEORGE C. CAMILLI; NEIL J. DAVIDSON; HASTY WATER COMPANY, INC.; McCLAVE WATER ASSOCIATION, INC.; MAY VALLEY WATER ASSOCIATION, INC.; EMERY CASS; BERNICE CASS; BENT COUNTY FARM BUREAU; ROUTT COUNTY CATTLEMEN'S ASSOCIATION; ELK RIVER CITIZEN'S ASSOCIATION; FORREST WARREN; M.W. CARVER; WILLIAM B. MAY; RAYMOND GRAY; JOHN E. SANDELIN; IVA CATHERINE SANDELIN; RICHARD P. WARRICK; FLORENCE E. WARRICK; EDWARD B. COUGHLIN; JOHN SMARTT RANCH, INC.; HARLEY J. KOELLER; WESLEY SPLITTER; BUFFALO MUTUAL IRRIGATION COMPANY; HENRY CLAY KIMBROUGH; HERB REYHER, d/b/a REYHER ENTERPRISES, INC.; LA PLATA WATER CONSERVANCY DISTRICT; PINE RIVER IRRIGATION

DISTRICT; DOLORES WATER CONSERVANCY DISTRICT; MANCOS WATER CONSERVANCY DISTRICT; SAN MIGUEL WATER CONSERVANCY DISTRICT; SUMMIT IRRIGATION AND RESERVOIR COMPANY; F&I SCOTT & CO.; JOHN SCHMITT; ROBERT K. TAYLOR; ARTHUR ISGAR; CHARLES M. ROGERS; NOLAND ALEXANDER; RODGER IVES; TOM GILLILAND; CHARLES M. McAFEE; FLORIDA WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; THE CONSOLIDATED MUTUAL WATER CO.; DOUGLAS COUNTY SCHOOL DISTRICT RE-1; LUCAS WILSON; RONALD KIRBY; FRANK SATTERFIELD; CITY OF THORNTON BY ITS UTILITIES BOARD; MOUNTAIN STATES LEGAL FOUNDATION; COMMITTEE TO DEFEND YOUR PRIVATE WATER; DEAN A. STONE; DAVID L. THOMPSON; COUNTY OF EAGLE, COLORADO; VAIL ASSOCIATES, INC.; BEAVER CREEK METROPOLITAN DISTRICT; NICK ALFRED STRUBI; RUTH H. BROWN; TWIN LAKES RESERVOIR AND CANAL CO.; BRUSH CREEK AND EAGLE RIVER COMPANY; TOWN OF EAGLE, COLORADO; VAIL VILLAGE WEST WATER & SANITATION DISTRICT; UPPER GUNNISON WATER PROTECTION AUTHORITY, INC., a Colorado corporation; DR. ROBERT G. WILLEY; DR. RUTH L. WILLEY; SODERQUIST RANCHES, INC., a Colorado corporation; ALBERT MAURER; RUBY MAURER; RUSSELL COLLINS; FRANK MEAKER and SONS; JERRY and DOROTHY DENISON; JIM LAZZERI; JOHN R. LONG; TOWN OF CRESTED BUTTE, COLORADO, a Municipal corporation; ALVIN O. BERG; VERA BERG; JOHN W. NEMANIC; JOSEPH M. NEMANIC; LYLE T. McNEILL; MILDRED McNEILL; WILLIAM C.

DAVIS; MARCELLA DAVIS; RIVERBEND HOMEOWNERS' ASSOCIATION, INC., a Colorado corporation; RIVERBEND SUBDIVISION; JOHN W. LILL; MARY HELEN LILL; E.L. HILT; V. PAULINE HILT; DOS RIOS RANCHES, INC., a Colorado corporation; FLETCHER CORPORATION, a Colorado corporation; LANDS END CO., a Colorado corporation; P.D. SAMS; P&J VADER RANCH, a partnership; GERTRUDE VADER; JACK McLAIN; LOUISE McLAIN; PAUL H. VADER; ANNE MARIE VADER; DUANE PHELPS; DONNA P. PHELPS; RICHARD MARK VADER; JEAN LEE VADER; HARRY D. VADER; INA FAY VADER; DAN I. VADER; LETHA VADER; TRIANGLE 2 RANCH, a Colorado corporation; COLLARD LAND CO., a Colorado corporation; PAUL NICHOLAS; AUGUST NICHOLAS; CLIFTON WOODS; KEITH F. LEWIS; ROBERT BULLINGTON; OCTAVE NICHOLAS; ESTEN B. ORME; NICK H. GRAY; BRUTON ESTATE; LEE R. HAWKS; BUTTE ROCK RANCHES, INC., a Colorado corporation; TOWN OF LAKE CITY, COLORADO, a municipal corporation; KEITH HEGARTY; SHARON D. HEGARTY; JUNE E. FULTON; HELEN FULTON; DAVID FULTON; CRESTED BUTTE WATER AND SANITATION DISTRICT, a Colorado corporation; THE CORPORATION OF ROCKY MOUNTAIN BIOLOGICAL LABORATORY AT GOTHIC, a Colorado corporation;

Appellees.

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Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

CITATIONS TO OPINIONS BELOW

The Special Water Judge's Ruling, Judgment and Certification to the Colorado Supreme Court, printed in Appendix A, is unreported. The Final judgment and Opinion entered by the Colorado Supreme Court on appeal, as modified and supplemented on denial of rehearing, is reported at 671 P.2d 1294 (Colo. 1983), and is set forth in Appendix B.

JURISDICTION

The original Opinion of the Colorado Supreme Court was entered July 18, 1983. By Order entered July 29, 1983, the Court extended the time within which Petitions for Rehearing could be filed, to October 3, 1983. Petitioners' Petition for Rehearing was filed October 3, 1983. On November 7, 1983, the Colorado Supreme Court modified and supplemented its Opinion and denied all Petitions for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Citations to pertinent constitutional and statutory provisions are set forth in the Table of Contents, *supra*. The text of such provisions is published in Appendix C.

STATEMENT OF THE CASE

Historical Background

The facts material to the consideration of the questions presented in this case commence with acquisition by the federal government of land which now comprises the State of Colorado. By the Louisiana Purchase, a treaty with Spain, a cession from Mexico and a purchase from Texas, the United States acquired all of the land which now comprises the State of Colorado. Commencing in

1862, the public lands were released for settlement and private ownership. Private owners, acquiring government patents to land, acquired the common law right to the ground water lying beneath the land.

In 1963 the Colorado Supreme Court, in *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), gave unequivocable judicial recognition of the right of a landowner to the nontributary ground water beneath his land, stating that the landowner has a vested property right in the water in his soil and that water not tributary to any public stream is private property. The court also noted the long-recognized right of farmers to sink wells on their farms to make reasonable use of the ground water. In the decision which is the subject of this appeal, commonly referred to as the *Huston* decision—after John Huston, one of the initial applicants—the Colorado Supreme Court also noted the practice of drilling wells for the withdrawal of nontributary ground water and recognized the "substantial" number of such wells. Appendix B, n. 27. As recently as 1979, the Colorado Supreme Court in *Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979), apparently reaffirmed its previously stated doctrine governing the right to nontributary ground water.

In its decision in this case, the Colorado Supreme Court has suddenly repudiated the doctrine it confirmed in *Whitten*, has denied private ownership of nontributary ground water, has asserted a severance of the right to nontributary ground water from the ownership of land, and has declared that the resource is public property, subject to the plenary control of the state legislature.

The *Huston* decision potentially impacts every landowner in the State of Colorado, including the federal government. Through the process of patenting and other federal conveyances, the United States has disposed of approximately 55 million acres of land within the state, but has retained approximately 45 million acres. Department of Interior, PUBLIC LAND STATISTICS 9 (1982). All owners of the 55% of those lands held in private ownership trace title through a chain originating with the federal government. The impact of the *Huston* decision is evidenced by the appearance of hundreds of parties, listed in several pages of caption, the value of whose water rights is in the billions of dollars. Petitioners here are all landowners who seek to protect their water rights.

Procedural History

The complete procedural history of this case is set forth in the Opinion of the Colorado Supreme Court, Appendix B. History particularly relevant to this appeal is set forth briefly hereafter. In December of 1978 several groups of claimants filed applications for determinations of water rights in Colorado. Because there were questions of law basic to the disposition of all of the applications, the Colorado Supreme Court consolidated the cases and assigned a Special Water Judge the responsibility of resolving those basic questions of law. The threshold question submitted to the Special Water Judge was whether nontributary waters in Colorado are subject to appropriation. The Judge was directed to answer additional questions in the event that he ruled affirmatively on the threshold question. The Special Water Judge, acting as an officer of the Supreme Court entered a ruling and judgment which was certified to the Supreme Court for its

further consideration. At the Supreme Court, all issues were thoroughly briefed. In the Opening Brief, Reply Brief, Petition For Rehearing and Petition For Further Consideration which were filed on behalf of petitioners herein, the issues relating to ownership of nontributary ground water and the constitutional prohibitions against taking such property without due process and against impairment of the obligation of contracts were raised for that court's consideration. The fact that Colorado landowners acquired rights to nontributary ground water beneath their land through federal patents to which they trace the origin of their title was also presented to the court. The court resolved all these issues by finding that the federal government had severed all water rights from the land, that private rights to nontributary water never existed and that they therefore were not subject to the protection of the constitution.

REASONS FOR GRANTING THE WRIT

I. The Colorado Supreme Court's Huston Decision Destroys Vested Rights Of The Federal Government And Its Patentees, And Results In An Unconstitutional Taking Of The Property Which Landowners In Colorado Have In The Nontributary Ground Water Contained In Their Soil.

A. The Opinion of the Colorado Supreme Court in Huston is repugnant to this Court's decision in Hughes v. State.

In *Hughes v. State*, 389 U.S. 290 (1967), this Court granted certiorari to review, and reversed, the decision of a state supreme court on grounds which are factually and legally indistinguishable from those now presented in this writ. Therein, the owner of ocean-front property in the state of Washington, who traced her title to a

federal patent prior to statehood, instituted an action against the state to determine whether the right of adjoining landowners to gradual accretions, which existed under the common law prior to statehood, was abolished by a provision of the state constitution. The Washington Supreme Court had addressed this issue twenty years earlier in *Ghione v. State,* 26 Wash.2d 635, 175 P.2d (1946). In that case, the Court held that in spite of the 1889 constitutional provision, title to accretions vested in the owner of the adjoining land. Now, in the *Hughes* case the Washington court faced the same issue. This time, it held that this issue was controlled by state law and that, when Washington became a state in 1889, future accretions were by its constitution reserved for the public domain and private rights therein were terminated.

On certiorari, the Supreme Court of the United States reversed, and held that federal rather than state law was controlling and that, under federal law, title to gradual accretions vested in the adjoining landowner. Mr. Justice Stewart concurred with the decision and reasoning of the Court, but added a thorough analysis of the due process issue raised by the case. The reasoning contained in that analysis was so compelling that six years later, the seven member majority issued a warning concerning the taking issue, citing the very words of Mr. Justice Stewart's concurring opinion. *See Bonelli Cattle Co. v. State,* 414 U.S. 313, 331 (1973), rev'd on other grounds, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). Because that opinion so thoroughly analyzed the points at issue here, it is recommended to the Court in its entirety and is quoted extensively hereafter.

In his concurring opinion, Mr. Justice Stewart agreed that the extent of the federal grant to which plaintiff traced her ownership was originally measurable by federal common law. He emphasized, however, that the state supreme court had now ruled that private rights to ocean-front accretions were terminated when Washington became a state, and that the plaintiff could not claim immunity from changes in the property law of the state simply because her title derived from a federal grant. Mr. Justice Stewart was nevertheless quick to caution that "[l]ike any other property owner . . . [the plaintiff could] insist, quite apart from the federal origin of her title, that the State not take her land without just compensation." *Id.* at 535. Mr. Justice Stewart continued:

> [A] conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
>
> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. • • • For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. [citations omitted]. The Washington court insisted that its decision was 'not startling.' [cita-

> tion omitted]. What is at issue here is the accuracy of that characterization.

Id. at 535-36. As noted above, the Supreme Court of Washington had previously held, in *Ghione v. State*, that title to accretions under Washington law vested in the owner of the adjoining land in years subsequent to, as well as before, statehood. Hence, the decision in *Hughes*, some twenty years later, effected an unforeseen change in Washington property law as expounded by the state supreme court. Mr. Justice Stewart concluded:

> There can be little doubt about the impact of that change upon [the plaintiff]: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 536.

The seriousness of the constitutional concerns voiced in the *Hughes* concurrence is evidenced by the fact that this Court subsequently felt constrained to reiterate Mr.

Justice Stewart's warning in the *Bonelli* case where the Court had found it unnecessary to even decide whether the state's assertion of title to accreted lands constituted a taking of the riparian owner's property therein.

The ruling of the Colorado Supreme Court in *Huston* is in direct conflict with the pronouncements of this Court in *Hughes v. State*. The two cases are factually indistinguishable. In *Hughes*, patents from the federal government included as an incident to the land conveyed, the rights to any accretions thereto. In *Huston*, patents from the federal government included, as an incident to the land conveyed, the rights to the nontributary water beneath the surface. In *Huston*, as in *Hughes*, patents from the federal government included, incident to the land conveyed, rights in and to the contested property. In *Huston*, as in *Hughes*, such property rights of the landowner were derived by patents from the United States Government, were recognized under federal common law and had been unequivocally confirmed by the highest court of the state some twenty years prior to the decision renouncing the same. Unlike *Hughes*, however, the retroactive transformation of private property into public property effected by the decision of the state supreme court in *Huston* stands unredressed, unless this Court accepts this case for its consideration.

B. Patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.

The right of a landowner to the water in his soil has long been recognized under federal common law. *See United States v. Alexander*, 148 U.S. 186, 192 (1893). If the United States, the original owner of public domain

lands and of the nontributary ground water contained therein, never affirmatively separated the title to such water from that of the land, title to nontributary ground water would necessarily remain today with the United States or, as to those portions of the public domain which were patented to others, have passed to and reside with patentees of the federal lands.

In *Huston*, the Colorado Supreme Court incorrectly held that the United States "severed" nontributary ground water from the realty at the time it patented lands, and reserved it for the use of the public according to state law. (Opinion at 28). This view is said to be supported by the federal scheme for transfer of public domain lands, implemented through the Acts of 1866 and 1877, "whereby the states were granted broad authority to provide for the use of non-navigable water within their borders." (Opinion at 54).

The grant of authority to the states in the Act of 1866 provides:

> "*Whenever, by priority of possession, rights* to the use of water for mining, agricultural, manufacturing, or other purposes *have vested* and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . ."

Ch. 262, § 9, 14 Stat. 253 (currently codified at 30 U.S.C. § 51 (1976) (emphasis added)). By its clear and express wording, this statute is applicable only to those waters of the state of Colorado as to which Colorado's local customs, laws, and decisions of courts make *priority* the criterion of relative right. Thus, as demonstrated in Section C hereafter, the statute deals only with surface or

tributary waters, and not nontributary waters at issue here.

The Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1976)), by its express language and as construed, similarly fails to support the contention that nontributary ground water was severed from the realty when the federal government patented lands thereunder. According to the Act, the right to the use of water by a claimant depended upon prior appropriation, limited in quantity to the amount of water actually appropriated and necessarily used for irrigation and reclamation purposes, and "all surplus water . . . together with the water of all lakes, rivers, and other sources of supply *upon* the lands and not navigable" were to "be held free for the appropriation and use of the public." *Id.* (emphasis added). *Accord California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (holding that the Act "effected a severance of all waters *upon* the public domain, not theretofore appropriated, from the land itself" and that a patent carried with it "no common law right to the water *flowing through* or *bordering upon* the lands conveyed." (emphasis added)). The Desert Land Act simply did not concern or affect title to nontributary, non-surface water in Colorado.

The title of the United States to the nontributary ground water underlying the public domain was thus undiminished by the Acts of Congress concerning waters in or tributary to natural surface streams, and today remains in the United States or has passed by patent to patentees of federal lands.

C. State law has always recognized that ownership of nontributary ground water is vested in the overlying landowner.

In *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), the Supreme Court of Colorado unequivocally confirmed what had long been the law governing ownership of nontributary ground water within the state. Therein, the question before the Court was whether a 1948 decree adjudicating the priorities of certain nontributary wells was valid and would support an injunction prohibiting others without decreed rights from withdrawing water from the same aquifer.

The lower court, in granting the injunction, concluded that "[t]he underground waters [were] public and subject to private appropriation by putting to beneficial use, and the decree adjudicating priorities was valid." *Id.* at 160, 385 P.2d at 133. The Colorado Supreme Court reversed. It held that the nontributary ground water belonged to the owner of the overlying land and that, consequently, the court had been without jurisdiction to adjudicate the same in 1948. The Colorado Supreme Court stated that "water not tributary to any public stream . . . is . . . private property", *id.* at 172, 385 P.2d at 139, and cited with approval the following language:

> Ground water, in Colorado's century of water use development, is not to be regarded as property of the public, except in such instances where it is tributary to a natural stream. * * * It has long been recognized that farmers may sink wells on their farms to make reasonable use of the ground water. Public interest requires that a social economy built in reliance on a principle so long recognized should not be disturbed.
>
> * * *

> *The landowner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation.*

Id. at 173-74, 385 P.2d at 140 (emphasis added).

The law of ownership of nontributary water was established prior to the issuance of patents from the federal government. That law has been evidenced by local customs and recognized in the decisions of Colorado courts not only in *Whitten* but also as recently as 1979 in *Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979).

Thus, *Whitten v. Coit* expressly confirmed what had always been the common law and has remained until *Huston* the law, that ownership of nontributary ground water in the state is vested in the overlying landowner.

D. The Colorado Supreme Court's Opinion in Huston results in an unconstitutional taking of the vested property rights of landowners in the nontributary ground water contained in their soil.

In *Huston*, the Colorado Supreme Court disregarded the property rights in nontributary ground water recognized at federal common law, which were vested long ago in the United States and in patentees of federal lands, and departed from the Court's own unmistakable prior property pronouncements that the overlying landowner owns the nontributary water in his soil. The Court's Opinion indicates that such water is now *publici juris* (owned by the public) and subject to disposition, or allocation for use, according to the desires of the state through the legislature.

The Court's position on the ownership issue is fundamentally flawed in several respects. First, the Court incorrectly determined that the title of the United States to nontributary ground water was severed from the realty and reserved for the use of the public according to state law at the time the federal government patented its lands. Second, the Court mistakenly concluded that it was unconstrained to recognize the property rights confirmed in *Whitten* because (1) the pronouncements in *Whitten* concerning private ownership of nontributary ground water were not necessary to that decision; and because (2) "given the state's plenary control over development of water law, the traditional property concept of fee ownership [was] of limited usefulness as applied to nontributary ground water. . . ." (Opinion at 55).

The above justifications advanced by the Court may well call to mind Justice Stewart's warning in *Hughes* that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State*, at 535-36. By misinterpreting the clear import of enactments of Congress, the Colorado Supreme Court concluded that property rights to nontributary water were not vested in the federal government or in individuals by virtue of grants from the federal government. Similarly, by characterizing the pronouncements in *Whitten* concerning ownership of nontributary ground water as "unnecessary" and of "limited usefulness," the Court denied that rights of the overlying landowner to the nontributary ground water in his soil were recognized under state law. The pronouncements in *Whit-*

ten were clearly not *obiter dictum*. The determination therein of the invalidity of the 1948 decree adjudicating priorities of nontributary wells depended entirely upon whether the subject water was publicly or privately owned. If the water was public, it was subject to adjudication; if it was private, it was not. Moreover, the Colorado Supreme Court's view as to the relative "usefulness" of various property doctrines simply cannot, as a matter of federal constitutional law, justify its substitution, without compensation, of a more appropriate or expedient method by which rights to utilize nontributary ground water should be recognized, in derogation of the federal and private property rights previously vested therein.

What the Colorado Supreme Court has done in *Huston* is to deprive the United States Government of the power to hold title to or convey, either before or after Colorado statehood, the entire property which the United States has in unpatented land. By erroneously construing the acts of 1866 and 1877, and contrary to the will of Congress as expressed in those acts, the Colorado Supreme Court has seized the nontributary ground water underlying land of the United States and deprived the United States Government of the power to own or to convey that water to a patentee.

Insofar as the Opinion of the Colorado Supreme Court in *Huston* denies private and federal ownership of nontributary ground water and authorizes the state to dispose of it or allocate it for use, the Court has effectuated a taking of the private property which every landowner in Colorado has in any nontributary ground water underlying his land. Such a result cannot stand under the

fifth amendment to the United States Constitution, made applicable to the State through the due process clause of the fourteenth amendment.

II. The Opinion Of The Colorado Supreme Court Interprets Statutes In Such A Way That They Impair The Obligation Of Contracts.

Article I, Section 10 of the Constitution of the United States prohibits the state from passing any law "impairing the obligation of contracts." The Opinion of the Colorado Supreme Court interprets the federal and state statutory scheme in a way which reaches that unconstitutional result.

The United States Supreme Court in *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 429-30 (1934), stated:

> "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

In *Hann v. City of Clinton,* 131 F.2d 978, 983 (10th Cir. 1942), the Tenth Circuit Court of Appeals stated the well-recognized rule that:

> "The law existing at the time of the issuance of bonds and authorizing their issuance entered into and becomes an essential part of the contract in such way that the obligation of the contract cannot be impaired or its fulfillment hampered or obstructed by subsequent change in the law."

The Court further noted the prevailing rule that:

> "[T]he settled judicial construction placed upon a statute becomes as much a part of it as the text itself, so far as contract rights acquired under the statute are concerned; and *in point of impairment of the ob-*

> *ligation of the contract, a change of decision after the rights are acquired is to all intents and purposes the same in its effect as an amendment of the law by means of a legislative enactment.* (citations omitted) (emphasis added).

Based on Colorado law, as specifically enunciated in *Whitten v. Coit* in September of 1963, all contracts entered into for the sale and purchase of land incorporated the existing law, as declared by this Court:

> "... Water not tributary to any public stream ... is ... private property."
>
> • • •
>
> "The landowner has property in the water in his soil."

Whitten v. Coit, 153 Colo. at 172, 174, 385 P.2d at ———.

During the twenty years between *Whitten* and *Huston*, there have undoubtedly been thousands upon thousands of contracts entered into for the purchase and sale of land within the State of Colorado. Although in its current posture there has yet been no evidence before the Court of contracts entered into in reliance on that law, such reliance is presumed. As succinctly stated by the court in *Continental Supply Co. v. Abell*, 95 Mont. 148, 171, 24 P.2d 133, 140 (1933):

> "It is unnecessary that it be shown that reliance was actually placed by Defendants upon the former decisions. Reliance thereon will be presumed." (citations omitted).

That same principle was stated by Justice Cardozo in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 362 (1932), when he stated that the

carrier and shipper involved in that case "would be presumed to bargain with each other on the basis of existing law." To now state, as the Colorado Supreme Court's Opinion does, that the purchaser of land does not obtain ownership of the underlying nontributary ground water impairs the very substance upon which purchasers and sellers are presumed to have bargained with each other in contracts for conveyance of Colorado land. In so doing, the Opinion reaches a result not tolerable under the United States Constitution.

CONCLUSION

In *Huston* the Colorado Supreme Court committed exactly the same errors which this Court corrected in *Hughes v. State*. By its decision the *Huston* court denied the validity of federal property rights, whether retained by the United States or patented to private landowners, it effected a taking of property without compensation and it impaired the obligation of contracts for the purchase and sale of land. The Court's startling repudiation of property doctrines clearly established in *Whitten v. Coit* effected an intolerable change in property law with widespread impacts upon both private landowner and the federal government. Review of the case by this court is imperative in order to prevent a conflict between the Colorado Supreme Court's decision and the principles enunciated by this Court in *Hughes v. Washington* and later reaffirmed in the *Bonelli* case.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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